United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Corrected Brief

B
P/S

75-1121

To be argued by
VICTOR D. STONE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In The Matter Of
THOMAS DI BELLA, Witness,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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Miscellaneous:

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In The Matter Of
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QUESTIONS PRESENTED

1. Whether a Department of Justice attorney, assigned by an Assistant Attorney General to conduct any kind of legal proceedings, including grand jury proceedings, which United States Attorneys are authorized to conduct, may properly appear and question witnesses before the grand jury.

2. Whether the order conferring use immunity from prosecution was valid.

3. Whether appellant's confinement for civil contempt for refusing to answer questions before a grand jury despite a grant of use immunity requires further proceedings in the district court.

STATEMENT

On June 10, 1974, appellant was subpoenaed before a special grand jury sitting in the Eastern District of New York empanelled to investigate racketerring -- in particular, illegal gambling and loan sharking and related activities. 499 F.2d 1176. On the same day, Chief Judge Jacob Mishler signed an order (A. 52) granting appellant immunity pursuant to 18 U.S.C. 6002 and 6003. Despite the immunity order, appellant refused to answer the questions put to him and was held in civil contempt. This court affirmed, In re Di Bella, 499 F.2d 1175, cert. den., ___ U.S. ___, 95 S.Ct. 513 (November 25, 1974).

Subsequently, in December 1974 appellant was re-subpoenaed to appear in January 1975 before the special grand jury in the Eastern District of New York. On the application of appellant's attorney, his appearance was continued until March 3, 1975.

Prior to the time of appellant's scheduled appearance before the grand jury, appellant's counsel filed a memorandum of law and moved the United States District Court for the Eastern District of New York to quash appellant's subpoena (A. 3 lines 4, 9-10). At a hearing before United States District Judge Thomas C. Platt on the morning of March 3, 1975, appellant argued that Robert Del Grosso, who was a regular Department of Justice Criminal Division attorney assigned to its Organized Crime Section and their Brooklyn field office, was improperly authorized to present evidence to the special grand jury (A. 3-A.14). The district court denied appellant's motion (A. 14, line 17).

Appellant then went before the grand jury. After he was sworn under oath and the prior immunity order was explained to him, appellant refused to answer questions -- including whether he was employed -- which were put to him by Mr. Del Grosso and by the grand jury foreman (A. 16, lines 15-22, A. 32, lines 5-6, A. 35, line 24, A. 36, line 1).

Thereafter appellant again appeared before the district judge. After ascertaining that neither Mr. Del Grosso nor appellant's counsel desired the courtroom cleared of spectators, the court then declared on its own motion that the courtroom would have to be cleared because the proceeding was part of a grand jury proceeding (A. 15). Appellant's counsel, who did not object to the court's order clearing the courtroom, then asked whether an exception could be made to allow a friend of appellant to remain in the courtroom. The court denied the request and appellant's counsel responded "All right." (A. 15, line 17). Mr. Del Grosso then recited the substance of what had occurred in the grand jury to the court, i.e., that appellant had been sworn, that the immunity order had been explained to him, and that he had refused to answer questions, including whether he was employed, put to him by Mr. Del Grosso and by the grand jury foreman (A. 16, lines 15-22; A. 32, lines 4-6). He asked the Court to hold appellant in contempt in violation of 28 U.S.C. 1826 (A. 16, 32). In response, appellant's counsel raised legal objections to the immunity order and the grand jury proceedings (A. 17-25)

Judge Platt overruled these objections, told appellant that the prior immunity order was still in force (A. 17-20), and directed appellant to return to the grand jury

and answer all the questions put to him (A. 31).[1] When appellant declined, the court ordered him to return to the grand jury and answer the questions put to him (A. 36-37). Appellant informed the court that he did not wish to go back to the grand jury and that he would not answer questions (A. 37). The court then held appellant in contempt, pursuant to 28 U.S.C. 1826, and sentenced him to imprisonment for a term of six months, or for the life of the grand jury, whichever was shorter, or until he purged himself of the contempt (A. 37, 47). The court stated to appellant that "the key to your release is in your own hands" (A. 47, line 2). This appeal followed (A. 50-51).

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[1] During that part of the district court proceeding when the grand jury minutes of appellant's appearance were read to the court, the district court excluded appellant's attorney, but not appellant, from the courtroom (A. 33-35). When the reading of the grand jury minutes were completed, the court gave appellant's counsel time to consult with appellant and advised appellant's counsel that the substance of what had transpired was that his client "has been taken before the grand jury and refused to answer questions in accordance with the directions of this Court." (A. 35, line 24; A. 36, line 1)

ARGUMENT

I. A JUSTICE DEPARTMENT ATTORNEY, ASSIGNED BY AN ASSISTANT ATTORNEY GENERAL TO CONDUCT ANY KIND OF LEGAL PROCEEDINGS, INCLUDING GRAND JURY PROCEEDINGS, WHICH UNITED STATES ATTORNEYS ARE AUTHORIZED TO CONDUCT MAY PROPERLY APPEAR AND QUESTION WITNESSES BEFORE THE GRAND JURY.

The immunized witness in this case, like the witness in In re Alphonse Persico, No. 75-2030 argued before this Court on March 19, 1975, contends that the organized crime strike force attorney has no authority to appear and question him before the grand jury. This contention has now been raised in numerous cases, not only by immunized witnesses but by criminal defendants seeking dismissal of their indictments. It developed from Judge Oliver's opinions in United States v. Williams, 74 Cr. 47-W-1 (W.D. Mo.), decided October 21, 1974, November 15, 1974, and December 3, 1974 which initially questioned the authority of organized crime strike force attorneys to conduct grand jury and district court proceedings. See also Judge Oliver's opinion in United States v. Agrusa, 74 Cr. 269-W-1 (W.D. Mo.), February 25, 1973. With the exception of Judge Werker in United States v. Crispino, 74 Cr. 932 (S.D.N.Y.), decided February 13, 1975, motion for reconsideration denied, March 24, 1975, (A. 60-104) who agrees in part with Judge Oliver's conclusion, other district judges have rejected this contention. See e.g., Sandello v. Curran, M. 11-188 (S.D.N.Y.), decided February 27, 1975; In re Jerry Langella, 74C. 638

(E.D.N.Y.), decided February 27, 1975; United States v. Brown, 74 Cr. 867 (S.D.N.Y.), decided February 24, 1975; United States v. Jacobson, 74 Cr. 936 (S.D.N.Y.), decided March 3, 1975; United States v. Brodson, 74-Cr.-93 (E.D. Wisc.), decided January 31, 1975; United States v. Weiner, 74 Cr. 336 (N.D. Ill.), decided March 17, 1975; U.S. v. Kazonis, #74-238-5 (D. Mass. 3/24/75).

The attorney here, Robert Del Grosso, is the same attorney who questioned Persico. Our written argument on this point here, therefore, is with some modification a repetition of the argument that we made in Persico. At the outset, we point out here what we said in oral argument in that case. The witness here does not suggest that he would be willing to answer questions if an Assistant United States Attorney were substituted for the Department of Justice attorney. It is thus clear that the witness simply does not wish to testify before a grand jury under any circumstances.

The attorney here falls within the terms of Rules 6(d) and 54(c), F.R.Crim.P. as a government attorney who is permitted to participate in grand jury proceedings.[2/] He is a

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2/ Rule 6(d) states that "attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session." Rule 54(c) defines "attorney for the government" as including "an authorized assistant of the Attorney General" and "an authorized assistant of a United States Attorney."

regular Department of Justice Criminal Division Attorney assigned to its Organized Crime Section and to its field office in Brooklyn. In this role, he operates under the supervision of the Assistant Attorney General, the Section Chief, the Deputy Section Chief and the Attorney-In-Charge of the field office.[3] The latter coordinates his efforts with the local United States Attorney who in turn generally signs applications for immunity orders and usually reviews and signs all indictments returned by the Grand Jury.

Each Organized Crime Section attorney who presents evidence before the grand jury does so only after he obtains, as indicia of his authority, a letter of authorization signed by an Assistant Attorney General and files it, along with a copy of his duly executed oath of office, with the Clerk of the District Court.[4] This procedure follows a long established

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3/ The field offices were first established in 1966. See e.g., Annual Report of the Attorney General of the United States 1973 pp. 78-81 which includes a report to Congress about the Operation of the field office. Hearings before a Subcommittee of the Committee on Government Operations. H.R. 91st Cong., 2d Sess., August 13 and September 15, 1970 at pp. 83-120 where Department representatives testified about the strikes forces before a Congressional Committee. See also Note, The Strike Force: Organized Law Enforcement v. Organized Crime, 1970 Columbia Journal of Law and Social Problems 496.

4/ Neither a letter nor an oath is a prerequisite for a grand jury appearance by a government attorney. See United States v. Morton Salt Co., 216 F. Supp. 250, 256 (D. Minn. 1962), affirmed, 382 U.S. 44 (1965). For example, Assistant United States Attorneys may appear before the grand jury in their home districts without letters of authorization. The oath and salary limitations of 28 U.S.C. 515(b), which is [footnote continued on next page]

practice in the Department of Justice. Under this practice, the letter commonly recites that the attorney, even a regular department attorney, has been "specially retained and appointed as a Special Attorney under the authority of the Department of Justice" and specially authorized and retained to conduct legal proceedings including grand jury proceedings and that the attorney is to serve "without compensation other than the compensation you are now receiving under existing appointment." 5/

When the letter makes specific mention of the particular statutes into whose violation the grand jury intends to inquire, it also commonly includes a catch-all phrase, "other criminal laws of the United States." The letter, however, may not mention any specific statute and may simply recite that the inquiry covers various criminal laws of the United States.6/

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derived from the Act of June 22, 1870, discussed infra, apply only to the appointment of specially retained outside counsel, not officers of the Department. Prior to first entering on duty, each attorney of the Department executes the oath swearing to "faithfully discharge the duties of the office" he is about to enter.

5/ Anti-trust Division Attorneys generally are "specially retained and appointed under the authority of the Department of Justice" without any recitation that they are Special Attorneys.

6/ The practice of filing a letter of authorization does not stem from any statute or regulation. However, in May v. United States, 236 F.2d 495, 500 (8th Cir. 1916), the first case to interpret 34 Stat. 816 (1906), now 28 U.S.C. 515(a), the Eighth Circuit specifically asked that copies of the letter
[footnote continued on next page]

The primary issue here is whether such an attorney becomes an unauthorized person before the grand jury if his appointment letter authorizes him to conduct any kind of legal proceeding including grand jury proceedings "which United States Attorneys" are authorized to conduct rather than reciting some form of limitation on the inquiry that he may conduct (A. 57-58). Appellant, relying on Crispino, supra, contends that as Mr. Del Grosso in his capacity as a government attorney is an "attorney specially appointed by the Attorney General" under 28 U.S.C. §515 he must be "specifically directed by the Attorney General" to conduct some particular inquiry before the grand jury. Our position is that Del Grosso may properly appear before the grand jury as a government attorney under Rule 6 and under his specific assignment directing him to conduct proceedings "which United States Attorneys are authorized to conduct." We first show that this authority derives from the power of the Attorney General to conduct federal criminal litigation. We then focus on 28 U.S.C. 515, the statute considered by the district courts which have ruled against the government, and a related statute, 28 U.S.C. 543, and argue that, even under these specific statutes, the Attorney General has power to assign a department attorney to

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appointing specially retained counsel and his oath of office be presented "to any court in which the assistant attorney is called upon to act." Such a filing serves the function of keeping the district courts apprised of the particular government attorney whether specially retained or a regular officer, who is appearing before its grand juries. Over the years, the letters of authorization have been modified.

conduct grand jury inquiries in the same manner as a United States Attorney. We next show that the Attorney General's power to assign Criminal Division attorneys to a grand jury has properly been delegated to the Assistant Attorney General in charge of that division. Finally, we contend that a grand jury witness may not complain about the scope of authority of a government attorney to conduct a grand jury inquiry.

A. The Attorney General Has The Power To Conduct Federal Criminal Litigation And May Assign His Subordinate Officers To Conduct A Grand Jury Proceeding With The Same Wide Latitude Of Inquiry As The Grand Jury Itself.

It is settled law that the Executive Branch -- specifically, the Attorney General -- has the power to conduct federal criminal litigation including absolute discretion whether to prosecute. It is "an executive function within the exclusive prerogative of the Attorney General." United States v. Cox, 342 F.2d 167, 190 (5th Cir.), cert. den., 381 U.S. 935 (concurring opinion of Judge Wisdom). Accordingly, under the broad ambit of statutes under which the Attorney General operates, he may appoint officials "to detect and prosecute crimes against the United States," 28 U.S.C. §533. He has supervision of all litigation in which the United States is a party and is commanded to "direct all United States Attorneys, Assistant United States Attorneys, and special attorneys appointed under section 543 ... in the discharge of their respective duties" 28 U.S.C. §519. He may appoint Assistant United States Attorneys who shall reside in the district where

they are appointed, or "appoint special attorneys, regardless of their residence, to assist United States attorneys when the publi[c] interest so requires" 28 U.S.C. §§542, 543, 545. He may direct any officer of the Department of Justice to conduct and argue any case in any court of the United States, 28 U.S.C. §518. He also may direct "any other officer of the Department of Justice or any attorney specially appointed by the Attorney General under law ... when specifically directed by the Attorney General" to conduct any kind of legal proceedings "including grand jury proceedings", 28 U.S.C. 515. Moreover, since 28 U.S.C. 509, deriving from the Reorganization Acts of 1949 and 1950, vests all functions of the Department of Justice, with some exceptions, in the Attorney General, the statute for delegation appearing in 28 U.S.C. 510 is essential so that he may "make such provisions as he considers appropriate authorizing the performance by an officer ... of any function of the Attorney General." See United States v. Giordano, 416 U.S. 505, 513 (1974). On his part, the United States Attorney, an appointee of the President, has the duty "except as otherwise provided by law" to prosecute all offenses against the United States within his district, 28 U.S.C. 547.

Recently, the Supreme Court considered these principles and some of these statutes in ruling on the justiciability issue involving the Watergate Special Prosecutor and the President in United States v. Nixon, U.S. ___ (1974). The Supreme Court unequivocally stated that "the Executive

Branch has exclusive authority and absolute discretion to decide whether to prosecute." It also pointed out at ___:

> Under the authority of Art. II §2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C. §516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§509, 510, 515, 533. Acting pursuant to these statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure.

Clearly therefore, the Attorney General has authority to assign other officers of the Department of Justice, not only under 28 U.S.C. 515, but also under the other statutes giving him power over criminal litigation. If it were otherwise, then his broad power to conduct criminal litigation would be seriously hampered at its inception -- the initiation of a criminal case by presenting evidence before grand juries.

We have focused so far on the general authority of the Attorney General over federal criminal cases. But this power may not be considered in a vacuum. Not only may no serious criminal case be commenced with a grand jury indictment, but a grand jury itself has wide latitute to conduct an inquiry into violation of criminal laws. As the Supreme Court recently observed in United States v. Calandra, 414 U.S. 338, 343 (1974):

> Traditionally the grand jury has been accorded with latitute to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedures and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." Blair v. United States, 250 U.S. 273, 282 (1919).

Both the power of the Attorney General to designate an attorney to conduct a grand jury inquiry and the power of the grand jury to investigate would be circumscribed, despite the principles expressed in Calandra and Blair, if the Attorney General could not direct that his assigned officer could question as broadly as the scope of the inquiry. It would restrain the inquiry with a "technical procedural" rule -- the scope of the authority of the Justice Department lawyer. It would mean that questions by jurors themselves outside these bounds would be out of order. It would require that the inquiry "be limited narrowly by ... forecasts of the probable results of the investigation" despite the fact that the jury's role is to find probable cause. United States v. Dionisio, 410 U.S. 117 (1973). We submit, therefore, that the Attorney General's power to assign attorneys to a grand jury inquiry is of necessity as

broad as the inquiry itself or, in the words of 28 U.S.C. 515, as broad an inquiry as "United States attorneys are authorized by law to conduct."

Finally, we note that the scope of Mr. Del Grosso's authority, as a representative of the Attorney General, is not regulated or governed by his letter of authorization, the indicia of his authority, but rather by his superiors -- including the Attorney General -- in the Department of Justice. In Sullivan v. United States, 348 U.S. 170 (1954) the United States Attorney had presented evidence relating to violations of the Internal Revenue Code to a grand jury without having first obtained authorization to do so from the Attorney General as he was required to do by an Executive Order issued by the Attorney General. The grand jury filed an indictment. On appeal the failure of the United States Attorney to comply with the provisions of the Executive Order was asserted as grounds for dismissal of the indictment. In rejecting this claim the Court held at 174-174:

> The evidence was presented by the District Attorney, who was a representative of the Department of Justice, notwithstanding that he failed to comply with the departmental directive. For this he is answerable to the Department, but his action before the grand jury was not subject to attack by one indicted by the grand jury on such evidence.

Indeed in construing the purpose of the Executive Order, the Supreme Court noted that its purpose was to transfer responsibility for tax prosecutions to the Department of Justice

and was not intended to direct how such responsibility should be exercised. By the same token it is submitted that Congress in enacting 28 United States Code §515(a), and the other relevant statutes cited herein, merely defined the scope of the inherent power of the Attorney General as the Chief Executive of the Department of Justice and did not manifest any intent to direct how this power or responsibility was to be exercised. Thus where a departmental or special attorney exceeds his authority, it is submitted that the matter is one which should more properly be considered by the Department of Justice rather than by the Courts.Cf.,DiBella, supra, 499 F.2d at 1178.

B. Apart From Other Statutes, The Plain Language of 28 U.S.C. 543 And 28 U.S.C. 515 Gives The Attorney General Power To Assign Government Attorneys To Conduct Any Kind Of Legal Proceedings Which United States Attorneys Are Authorized To Conduct.

Turning from the broad statutory framework under which the Attorney General conducts the criminal litigation of the United States and focusing on the statutes to which the recent decisions of the district courts have directed their attention, 28 U.S.C. 515 and 543, the plain language of these statutes show that the Attorney General has the power to assign an attorney of the Department of Justice to conduct a grand jury inquiry with the same breadth as an inquiry conducted by a United States Attorney.

1. Section 543 gives the Attorney General power to appoint "attorneys to assist United States Attorneys when

the public interest so requires." This grant of power is similar to his authority under §542 to appoint Assistant United States Attorneys "when the public interest so requires." Neither statute contains any words of limitation on the power of these appointees to conduct criminal proceedings, including grand jury proceedings. Nor are we aware of any authority that suggests that an Assistant United States Attorney cannot conduct a broad grand jury inquiry by virtue of his office. A departmental or special attorney appointed under §543 should likewise be subject to no limitation. We submit that the letter of appointment of Mr. Del Grosso can reasonably be read to be an appointment under this section.

The strike force attorneys, to be sure, do not work directly under the United States Attorney. They work under an attorney-in-charge and under the chief of the Organized Crime Section. But this organizational structure does not preclude a conclusion that its attorneys are appointed to "assist" the United States Attorney. In our view, a finding that they are endeavoring to investigate and prosecute "organized crime" in a particular district constitutes assistance to the United States Attorney for that district. In any event, where, as here, the United States Attorney reviews and signs all indictments and the organized crime prosecutions are coordinated with him, it is clear that the attorneys of the strike force are "assisting" the United States Attorney.

In short, as Judge Frankel observed in United States v. Jacobson, supra (slip opinion pp. 3-4):

> Judge Judd in United States v. Albanese, supra, noted the broad authority of the Attorney General under 28 U.S.C. §§542 and 543(a) to appoint Assistant United States Attorneys and "attorneys to assist United States Attorneys" all over the country. The thrust of this statutory framework is against the straitened and sharply technical view urged by our movant. The head of a Department for a nation of over 213,000,000 people ought not to be required, either personally or through the Presidential appointees in his sub-cabinet posts, to appoint attorneys, one by one for specific cases. To be sure, large powers may be abused. Equally surely, and sadly, monstrous abuses have lately happened. But we must go on. It will not do for the judges to strain for grammatical traps to find violations of the Congressional will where (a) the statutory text compels no such finding, (b) the Congress is entirely content with the questioned action and could otherwise readily stop it, and (c) the result of the technical obstruction would be at best a temporary drag upon enforcement of the criminal law.

Cf. United States v. Bisceglia, No. 73-1245 (S.Ct.), decided February 19, 1975.

2. Section 515(a) provides that the "Attorney General or any officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are

authorized by law to conduct, whether or not he is a resident of the district in which the proceedings is brought." The language of §515(a) thus expressly provides that any attorney may be "specifically designated" to conduct "any kind of legal proceedings ... which United States attorneys are authorized by law to conduct", and the letters of authorization in question expressly state the attorney is "specifically authorized and directed to file informations ... and to conduct ... any kind of legal proceedings ... including grand jury proceedings ... which United States Attorneys are authorized to conduct." The plain meaning thus permits the Attorney General to give the assigned attorney a specific direction to conduct grand jury proceedings like the United States Attorney. Upon this basis alone, the letter of authorization was sufficient.

But even if the words "specifically directed" are read to require a specific limitation in the proceedings to which a special attorney is assigned, as the district court concluded in Crispino, supra, it does not follow that this construction is applicable to regular attorneys of the Department of Justice. The statute applies to three categories of attorneys: the Attorney General, any officer of the Department of Justice, and an attorney specially appointed by the Attorney General. The phrase "specifically directed" obviously does not apply to the Attorney General himself. Since §510, permits him to delegate this power to other officers of the department, there is no reason to read §515(a) to make the

phrase "specifically directed" restrict the authority of "any officer of the Department of Justice." In other words, if "specifically directed" constitutes a limitation, it should be read to be applicable in the words of the statute only to "any attorney specially appointed by the Attorney General under law (who) may, when specifically directed conduct any kind of legal proceedings." Again under this reading, Mr. Del Grosso had legal authority to conduct a broad grand jury inquiry. As a regular attorney in the Department of Justice, he qualifies under common usage as an officer of the Department of Justice. See e.g., the use by the Supreme Court of that term in United States v. Giordano, supra, and the discussion of the 1870 Act creating the Department of Justice, infra.

In sum, as Judge Pollock construed this section in United States v. Brown, supra, slip opinion pp. 12-13:[7/]

7/ See also Judge Pollock's remarks at slip opinion pp. 9-10:

> The statutory requirement of a specifically directed authorization was apparently enacted in an atmosphere of the appointment of individual special prosecutors with particularized experience for particular cases. But this should not be and has not been interpreted as a requirement to thwart the comprehensive sweep of the statutory language, which was to facilitate the government's prosecutorial efforts, when unleashed by the Attorney General to deal with rackets and organized crime through an elite corps of the government's prosecutors.

> Since the statute does not confine its application to particular facts or particular defendants, it would appear appropriate for the Courts to implement the public policies to be served through Strike Forces by upholding a broad grant of authority and to sustain a commission that directs members of the specially selected Strike Force to prosecute any kind of legal proceedings. Indeed to hold that such commissions are insufficiently specific would not serve any public purpose but might have mischievous and drastic effects as a precedent against the current needs of law enforcement across the county. No fundamental rights are at stake here that need be conserved in the constitutional interests of criminal targets. There is a strong public interest in implementing the broad purposes of the Congress and the executive by upholding the authority of the special prosecutors of the Strike Force.

Or, as Judge Frankel observed in Jacobson, supra, slip opinion pp. 2-3:

> As has been shown in the several opinions recently announced, the plain language of 28 U.S.C. §515 is comfortably read to validate the questioned appointments of special attorneys. The special attorney involved here received a letter of authority which, in literal terms, "specifically directed *** (the) conduct (of) any kind of legal proceeding, civil or criminal, including grand jury proceedings ***." There is, to be sure, arguable ground for a contrary view. However, where the question is one of asserted deviation from the command of Congress, it is a matter of at least some significance that the appointment and widespread employment of Strike Force attorneys

> has been one of the most publicized activities of the Department of Justice during the last decade. Reports of the Attorney General have, as Judge Werker noted repeatedly highlighted these activities. Congress has been made clearly aware of the enterprise -- through specific discussions at committee hearings as well as other means. The national operations of Strike Force attorneys have been funded without apparent question and with no intimation of doubt as to the authority on which these efforts were proceeding. "The repeated appropriations *** not only confirms (sic) the departmental construction of the statute, but constitutes (sic) a ratification of the action***."

Nor does the legislation sought by the Attorney General in 1945 to dispense with the practice of issuing special letters of appointment to attorneys assigned to a grand jury inquiry by the Department of Justice require a contrary construction, as Judge Werker concluded (A. 102, 97-98).[8/] The 1945 bill was never reported out of committee. As the Supreme Court said in Order of Conductors v. Swan, 329 U.S. 520, 529 (1947), another situation were Congress did not enact amendatory legislation:

> *** These bills were sent to an appropriate committee, but were never reported out. It does not appear whether the bills died because they were thought to be unnecessary or undesirable. No hearings were held; no committee reports were made. Under such circumstances, the failure of Congress to amend the statute is without meaning for purposes of statutory interpretation.

8/ Such legislation was primarily sought to eliminate the paperwork involved in issuing these letters.

See also United States v. Wise, 370 U.S. 405, 411 (1962); State Highway Commission of Missouri v. Volpe, 479 F.2d 1099, 1116-1118 (8th Cir. 1973).[9/]

C. The Legislative History Of 28 U.S.C. 515 Does Not Undermine The Broad Statutory Authority Granted To The Attorney General To Conduct The Criminal Litigation Of The United States.

We believe that the plain wording of the statute does not require resort to the legislative history of §515. However, we shall consider that history in light of the fact this was the prime basis for Judge Werker's conclusion in United States v. Crispino, supra, that the Attorney General has no power to give blanket authority to a Department of Justice attorney to conduct a grand jury inquiry in a particular judicial district (see A. 66-70, 87-90). This history neither undermines the plain wording of this statute nor the broad statutory authority granted to the Attorney General to conduct criminal litigation. Rather, the history of the 1906 Act, from which §515 originated, shows its purpose was to expand rather than contract the right of the Attorney General and his subordinates to conduct grand jury proceedings.

9/ Insofar as Judge Werker relies on the internal Department of Justice memorandum of May 1972 by an Criminal Division attorney to his section chief, (A. 103, 81), we point out what is obvious: the conclusions of a lower echelon attorney do not necessarily constitute the official position of the Department of Justice.

1. The 1861 and 1870 Acts. These two acts serve as a background to our consideration of the 1906 Act. In the Act of August 21, 1861, 12 Stat. 285, Congress provided that the Attorney General of the United States was "charged with the general superintendence and direction of the District attorneys ... as to the manner of discharging their respective duties." He was also "empowered, whenever in his opinion the public interest may require it, to employ and retain (in the name of the United States) such attorneys and counselors-at-law as he may think necessary to assist the District Attorney in the discharge of their duties and shall stipulate with such assistant counsel the amount of compensation." The latter section which has remained substantially unchanged is now codified as 28 U.S.C. 543(a).

The Act of June 22, 1870, 16 Stat. 162, which created the Department of Justice resulted in large measure out of abuses in the employment of outside counsel, including the payment of excessive fees and the sometime inferior quality of their services.[10/] Section 5 of this Act, 16 Stat. 163,

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10/ See e.g., the following passages from the Congressional Globe:

> This bill ... put an end to a system which might be perverted to purposes of favoritism.
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> Under various laws, and sometimes, perhaps, without any very definite law,

[footnote continued on next page]

consolidated in a single department the regular salaried staff of government officers, who were empowered to attend to the interests of the United States "in any suit pending ... or to

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> a practice has grown up largely since 1860 of giving employment to counsel for the Government in almost every conceivable capacity and under a great variety of circumstances -- to counsel who are not officers of the Government, nor amenable as such. Under appropriations for collecting the revenues, and other general purposes, very large fees have been paid for services which could have been performed by proper law officers at must less expense.
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> * * *
>
> The contingent funds of the Departments are now sometimes used to employ counsel. And in all the forms and under whatever authority counsel are employed there is now no limit on the fees that may be paid and none of the sanctions of official authority. Cong. Globe, 41st Cong. 2nd Sess. 3038 (1870) (House debates).
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> * * *
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> One of the objects of this bill is to establish a staff of law officers sufficiently numerous and of sufficient ability to transact this law business of the Government in all parts of the United States. Id. at 3035.
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> Retainers of $3,000 and $7,000 have been sent to counsel in other parts of the United States. Some have rendered service, and some we cannot find rendered any at all. Id. at 3036-3037.
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> ... the design (of the bill) is to prevent the appointment of those who are not responsible men -- that is, officers for

[footnote continued on next page]

attend to any other interest of the United States" under direction of and on behalf of the Attorney General.[11] With respect to the future expenditures for retention of outside (non-Department of Justice) counsel, to "assist in the trial of any case." Section 17 provided (16 Stat. 164) that the need for such counsel was to be publicly stated prior to their employment, and the scope of their commission was not to exceed this stated need:

> temporary duties, and whose charges are in excess of the fees paid to regular officers in the way of salary.
>
> ... the real object of this bill [is] to diminish the expense which the Government of the United States is now at for temporary legal assistants, and to substitute therefore a class of officers on fixed salaries who shall be responsible to their immediate superior, and who shall be regulated by law. I take it for granted, considering the highly respectable and discreet source from which this bill originates, that the object of the bill is retrenchment. The object of the bill is the prevention of what I may call the sporadic system of paying fees to persons, not to speak disrespectfully of them, who may be called departmental favorites. It is to regulate that which I think is an abuse.***
>
> In case [special] deputies are absolutely needed ... they are to have a special commission, and to act under the Attorney General. Id. at 4490 (Senate debates).

[11] In specific terms, §5, now 28 U.S.C. 517, provided that:

> ... The Attorney General may, whenever he deems it for the interest of the United States, conduct and argue any case in which the government is interested, in any
> [footnote continued on next page]

> ... no counsel or attorney fees shall hereafter be allowed to any person or persons, for services in such capacity to the United States, or any branch of the government thereof, unless hereafter authorized by law and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General, or Solicitor General, or the officers of the Department of Justice, or by the district attorneys. And every attorney and counsellor [sic] who shall be specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the government is interested, shall receive a commission from the head of said Department as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon such officers by law. [Emphasis added].

In the Congressional debates, it was made clear that the Attorney General would be held responsible for the special need to expend funds to retain outside counsel and

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> court of the United States, or may require the Solicitor General or any officer of the Department of Justice to do so. And the Solicitor General, or any officer of the Department of Justice may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States; for which service they shall receive, in addition to their salaries,

[footnote continued on next page]

for the quality of their performance.[12] This was to be accomplished by requiring that the need for outside counsel and the purposes for which he was retained be specified on the face of each special commission "in order that [counsel] may be responsible to him [the Attorney General] and to the government for the performance of their duties.[13] Thus,

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> their actual and necessary expenses, while so absent from the seat of government, the account thereof to be verified by affidavit. [Emphasis added].

12/ "There will of course have to be employed some special assistants ... they will be appointed by special commission, receiving a fee to be agreed upon or determined by the Attorney General, and by him alone, and which in no case will exceed the compensation properly allowable for the service rendered."

* * *

If the Attorney General cannot try the case and the emergency requires assistant counsel, he can employ [outside counsel]. It is then done by the head of the law department.... He is responsible as the chief law officer of the Government. If any error is committed we shall know who is chargeable with it. We have then the assurance, if he be the proper person, that the office will be administered economically. Congressional Globe, supra at 3036-3037.

13/ . These remarks came from the following statement in the Congressional Globe, supra at 3035:

> ... If the Attorney General, under the authority given him by existing law, shall employ assistant counsel in any district he shall designate those counsel as assistant district attorneys or assistants to the Attorney General, and give them commissions as such in the special business with which they

[footnote continued on next page]

Congress in establishing the Department of Justice showed no concern that its employees would interfere with the functions of the District Attorneys and gave the Attorney General power to use the persons he employed to attend to any interest of the United States. The primary Congressional concern was that the commissions be granted to outside counsel employed by the Attorney General so that their responsibility to the Attorney General would be clearly evidenced.

2. The Rosenthal, Cobban and Twining cases. Three district court cases also are a background to consideration of the 1906 Act.

In United States v. Rosenthal, 121 Fed. 862 (C.C.S.D.N.Y., 1903), the district court, proceeding on what we view to be a variety of erroneous premises, dismissed an indictment because a specially retained "assistant to the Attorney General became in fact the chief officer in the conduct of the investigation before the grand jury...." 121 Fed. 872. The district court's premises were that: (1) the

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> are charged, in order that they may be responsible to him and to the Government for the performance of their duties. The committee have been convinced most thoroughly by our investigations that no person should be charged with the conduct of litigation in behalf of the United States unless he holds a commission under the United States and is responsible to the law and the proper authorities." [Emphasis added].

Confiscation Cases, 74 U.S. 454, 457 (1868) held that the Attorney General and his officers had no power over any case or authority to appear before a grand jury in a criminal proceeding until after indictment despite the various statutes giving the Attorney General power over "cases in any court" and "any other interest of the United States"; (2) the statute empowering the appointment of special attorneys only authorized them "to assist in the trial of any case"; and (3) officers of the Department of Justice were limited to persons appointed by the President and with the advice or consent of the Senate.

However, the issue decided in the Confiscation Cases was that an Attorney General could dismiss a forfeiture suit over the objection of an informer. The facts thus do not involve, and the opinion does not discuss, the relative rights of the Attorney General vis-a-vis the United States Attorneys before grand juries. On the contrary, it repeatedly paraphrases the 1861 Act which provides that the Attorney General is responsible for the general supervision and ultimate control of all the duties of the United States Attorneys.

In addition, with respect to the language in §5 of the 1870 Act which explicitly gave the Attorney General the right to "conduct and argue any case in any court" and "attend to any other interest of the United States", 16 Stat. 163, in Rosenthal the court merely adhered to its erroneous interpretation of the Confiscation Cases and flatly rejected the

language in Councilmen v. Hitchcock, 142 U.S. 547, 563 (1892) which held that a "criminal case" includes grand jury proceedings.

Finally, as for the district court's narrow interpretation of the term "officers," §9 of the 1870 Act, 16 Stat. 163, after listing the officers of the Department of Justice that shall be appointed with the advise and consent of the Senate, provides that "all the other officers" of the Department shall be appointed by the Attorney General.

Thereafter, United States v. Cobban, 127 Fed. 713, 717 (D. Mont. 1904), and United States v. Twining, 132 Fed. 129, 131 (D. N.J. 1904), both rejected the Rosenthal construction, of what is now 28 U.S.C. 543 and 515(b). Cobban concluded that a special assistant to the United States Attorney could properly appear before the grand jury and Twining, in overruling motions to quash indictments, concluded the Department of Justice could appoint a special assistant to the District Attorney under what is now 28 U.S.C. 543 and authorize him to appear before the grand jury.

3. The Act of June 30, 1906. The express purpose of the bill as reflected in the House Committee report supports the Government's position (H.R. Rep. No. 2901, 59th Cong. 1st Sess. p. 1):[14/]

14/ The majority and minority reports of House Committee that considered the 1906 Act which became §515(a) are set forth in Judge Weker's opinion in Crispino (slip opinion pp. 8-10, Note 21 at p. V; A 67-69, 89-90).

> The purpose of this bill is to give to the Attorney General, or to any officer in his Department or to any attorney specially employed by him, the same rights, powers, and authority which district attorneys now have or may hereafter have in presenting and conducting proceedings before a grand jury or committing magistrate.

Nor is this broad purpose limited by the other language in the report, upon which Judge Werker relied on Crispino in which the committee speaks of special counsel having "special fitness" to assist the Attorney General in a "special case." The statute also is not restricted by the fact that the legislation was directed at the Rosenthal decision.

In the first place, when the report discussed the employment of "special counsel," it was not concerned with the interpretation of the purposed legislation but with the need for the legislation. Thus, the employment of special counsel in Rosenthal is discussed as a reason for the proposed legislation.

Second, this concern with specially retained outside counsel was obviously the basis upon which the report repeatedly cautioned the Attorney General that the expanded use of specially retained counsel should be accompanied by the appropriate justifications on the record. Apparently, this Congress, like the 1870 Congress, was concerned about

abuse in the employment of such counsel.[15/]

Third, the Attorney General did not request that the right to appear before grand juries be granted or restored to himself or to the other salaried officers in his regular employ. Rather as the report states (A. 68):

> The Attorney General states that it is necessary, in the due and proper administration of the law, that he shall be permitted to employ special counsel to assist the district attorney in cases which district attorneys or lawyers do not generally possess, and in cases of such usual [sic] importance to the Government, and that such counsel be permitted to possess all of the power and authority, in that particular case, granted to the district attorney, which, of course, includes his right to appear before a grand jury either with the district attorney or alone.
>
> It seems eminently proper that such power and authority be given by law. It has been the practice to do so in the past and it will be necessary that the practice shall continue in the future. H. Rep. No. 2901. supra at 2. [Emphasis added].

Thus, it was only as to special or outside counsel that the Attorney General thought the proposed legislation was necessary.

15/ Specific justifications or limitations were not contained, nor found lacking, in the commission sent in United States v. Crosthwaite, 168 U.S. 375, 376, 377 (1897). There, the special counsel involved was not specially retained, but a regular salaried officer of the Department of Justice and not entitled to any extra-compensation.

Indeed the minority report, which the majority did not question (A. 89-90), recognized that the Attorney General could appear before a grand jury.[16] It is clear, therefore, that Congress did not accept the construction in Rosenthal, supra, that the Attorney General and other officers of the Department could not participate in grand jury proceedings. Moreover, we submit the language "lawyers" referred to above apparently refers to the other lawyers in the Department of Justice. Such a reading shows that the report acknowledged that the use of other department lawyers need not to be justified in the same manner as the use of specially retained counsel.

Nor is there any suggestion in the report that the act was intended to modify or cutback on the right of a government attorney to appear before a grand jury and participate in other proceedings under what now is §543.

Finally, and significantly, when the bill was reported to and passed the Senate, there was no reference to

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16/ The minority report states in pertinent part (A. 90):

> It seems to us that part of the bill as reported should be stricken out, especially in view of the fact that the Attorney General himself has the right in any case of sufficient importance to appear in person. H. Rep. No. 2901, supra at 3.

the terms "specifically directed by the Attorney General" but the bill was simply described as providing authorization when "directed by the Attorney General" 40 Cong. Rec. 9662 (1906).[17] Since only the bill that was enacted, unlike

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17/ The Congressional Record shows the following:

LEGAL PROCEEDINGS DIRECTED BY THE ATTORNEY GENERAL

> Mr. CLARK of Wyoming. I am directed by the Committee on the Judiciary, to whom was referred the bill (H. R. 17714) to authorize the commencement and conduct of legal proceedings under the direction of the Attorney General, to report it without amendment, and I ask unanimous consent for its present consideration.
>
> There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill. It provides that the Attorney-General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney-General under any provision of law, may, when directed by the Attorney-General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct whether or not he or they be residents of the district in which such proceeding is brought.
>
> The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed. *** [Emphasis added]

earlier versions (S. 2969; H. R. 11264), uses the clause "which United States attorneys are authorized by law to conduct," this indicates that Congress intended that the Attorney General may direct attorneys to act in legal proceedings with the same authority as the United States Attorney.[18/]

D. Under The Three Decided Appellate Cases, The Government Attorney Here May Properly Appear And Question Appellant Before The Grand Jury.

The three appellate cases which have interpreted 28 U.S.C. 515 ruled that the assigned attorneys whether regular retained government attorneys or specially retained counsel could properly represent the government in the proceeding involved. The rationale of these decision however, has been different. But under all of the theories adopted, the government attorney here may properly appear and question appellant before the grand jury.

18/ Neither of these versions used the words "specifically directed by the Attorney General." The Senate version of the bill was introduced on June 11, 1906 two weeks before the house bill (H.R. 17714) was passed and referred to the Senate (A. 17-18). The Senate Report advised that it is frequently desirable and even necessary that the Attorney General detail an officer of the Department of Justice, or, where this is impractical, appoint a special assistant to the Attorney General, or special counsel to act independently of the United States Attorney, particularly in criminal matters and that the attorneys described in the bill should have the power to conduct proceedings before a grand jury. See, S. Rep. 3835, 59th Cong. 1st Sess. (1906). See Crispino, supra slip opinion, Note 17 (A. 18).

An earlier House version of the bill (H.R. 11264) listed particular officers of the Department of Justice who could participate in grand jury and court proceedings. The fact

[footnote continued on next page]

In May v. United States, 236 Fed. 495, 500 (8th Cir. 1916) one Robert Childs was specially retained at $25.00 per day plus expenses pursuant to a letter signed by an Assistant Attorney General, to assist in the preparation and trial "in the Eastern District of Missouri, " of the so-called "Oleomargarine Cases". After stating that the 1906 Act permitted the Attorney General to retain special counsel "personally or through his lawful assistants, the court concluded (236 Fed. at 500):

> This is not a proceeding to try the title of Mr. Childs to the office of special assistant to the Attorney General for the purpose mentioned in the appointment. It is a motion to quash an indictment for the reason that an unauthorized person took part in the proceedings of the grand jury which resulted in the indictment. Such a motion only attacks the authority of Mr. Childs in a collateral way, and beyond all question he was a de facto officer, acting by color of authority, and his acts are valid until it is judicially declared by a competent tribunal in a proceeding for that purpose that he has no right to the office, the duties of which he is performing.

Here, Mr. Del Grosso was more than a de facto officer. He was a regular Department of Justice attorney who under Judge Werker's opinion could investigate "organized

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that the bill as passed used the term "officers" rather than particular officers such as the Assistants Attorney General, is an indication that "officers" covers other attorneys in the Department of Justice.

crime" cases. Thus, assuming arguendo that his authority was excessive, it could not be subject to attack "in a collateral way."

In Shushan v. United States, 117 F.2d 110, 113-114 (5th Cir. 1941), cert. den., 313 U.S. 574, the defendants alleged that three "special assistants to the Attorney General" participated in the proceedings before the grand jury without having been specifically directed to do so by the Attorney General. Each commission evidenced the appointment of the person named as "special assistant to the Attorney General" and specifically directed him to conduct in the Eastern District of Louisiana, proceedings in which the United States was interested, including grand jury proceedings. In some of the commissions there was mention of the mail fraud statute, in which the violations are stated to have been committed by named persons "and other persons unknown." None of the commissions evidencing appointment specifically referred to any person indicted. The Court in refusing to abate the indictment on this ground concluded (117 F.2d at 114):

> We think it appears that these persons had and acted in an official status with respect to this case, and that the authority of each extended specifically to appearing in grand jury proceedings in the Eastern District of Louisiana in prosecutions under the mail fraud statute. The mention of persons supposed to be guilty was too

> general to restrict the authority to cases against them only. When a grand jury, which is an inquisitorial body, begins an investigation it cannot be known in advance whom they will indict.... The words of §310, "When thereunto specifically directed by the Attorney General, [to] conduct any kind of legal proceeding", are mainly for the protection of the United States. They do not require the naming of the persons or the particular cases to be prosecuted. Mail fraud cases in the Eastern District of Louisiana were specifically enough mentioned here, and we think it would be going too far to hold, at the instance of the accused, that the appointees were exceeding their authority in conducting this proceeding. [Emphasis supplied].

The instant case, as we have argued supra, clearly fits under the rationale that the inquisitorial nature of the grand jury makes it impossible for it to know in advance whom it will indict. The present letter, to be sure, is not confined to a particular character of cases such as mail fraud cases. But the same reason, the wide and broad range of the grand jury inquiry makes it equally inappropriate in a broad inquisitorial inquiry to name the crimes under which any indictment may be brought. And, as we argue infra, under Blair v. United States, 250 U.S. 273 (1919), a grand jury witness is not entitled to set the limits to such an inquiry. Finally, Shushan involved specially retained outside counsel, rather than regular Department of Justice attorneys, and since the statute is for "the protection of the United States", the Government is in no way injured when its regular attorneys appear before a grand jury pursuant to assignment. See our discussion of the 1870 Act, supra.

United States v. Hall, 145 F.2d 781, (9th Cir. 1944), cert. den., 324 U.S. 871 (1945), is the only appellate case which concerned the use of officials of the Department of Justice, rather than specially retained outside counsel. Consequently, the opinion does not talk in terms of special commissions, oaths or salary limitations. Rather, it focuses on whether participation by officers of the Department of Justice was, in fact, authorized by the Attorney General. The Court stated (145 F.2d at 785):

> We are of the opinion and so hold that the authorization may be direct to each designated officer of the Department or it may be to an officer in immediate supervision over several other such officers and may include such authorization to any or all of the several. And we are further of the opinion and we so hold that such authorization need not be directed to specifically designated cases but may be designated and limited descriptively as was done in the instant case by the Attorney General when he authorized Mr. Brett and the attorneys under his immediate direction to act in the kind of cases, to wit, such land cases as from time to time shall be assigned to the Los Angeles Lands Division office."

Here, the organizational makeup of the Criminal Division, its divisions into various sections, including the Organied Crime Section to which Mr. Del Grosso belongs, and over which the Assistant Attorney General presides, provides the designation that the Hall case would require.[19]

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[19] As the court pointed out in Veiner, supra, most of of the older cases under Section 515(a) have claimed that the letter of authorization was too narrow to permit the (CONT'T)

In sum, our position is summarized by Judge Learned Hand in Sutherland v. International Ins. Co. of New York, 43 F.2d 969, 970-971 in a different context:

> The Attorney General has powers of 'general superintendence and direction' over district attorneys (title 5, U.S. Code, § 317 [5 USCA § 317]), and may directly intervene to 'conduct and argue any case in any court of the United States' (title 5, U.S. Code, § 309 [5 USCA § 309]), including even proceedings before magistrates (title 5, U.S. Code, § 310 [5 USCA § 310]). Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties. And so, quite aside from the respectable authority that confirms our view, we should have had no doubt that no suit can be brought except the Attorney General, his subordinate, or a district attorney under his 'superintendence and direction,' appears for the United States.

(Footnote continued) challenged conduct and not, as the current defendants and witnesses argue, that the authority is too broad. The older cases have generally upheld the authority of Departmental or Special Attorneys to appear before grand juries. See United States v. Morse, 292 F. 273 (S.D.N.Y. 1922); United States v. Martins, 288 F. 991 (D. Mass. 1923); United States v. Amazon, 55 F.2d 254 (D. Md. 1931); United States v. Powell, 81 F. Supp. 288 (D. Mo. 1948); United States v. Morton Salt Co., 216 F. Supp. 25 (D. Minn. 1962); United States v. Sheffield, 43 F. Supp. (S.D.N.Y. 1942). But see United States v. Goldman, 28 F.2d 424 (D. Conn. 1928); United States v. Houston, 28 F.2d 451 (D. Ohio 1928); United States v. Cohen, 273 F. 620 (D. Mass. 1921).

II. The Assistant Attorney General Could Properly Authorize The Department Of Justice Attorney To Appear Before The Grand Jury.

The contention that the Attorney General could not delegate his power to assign government attorneys to the grand jury to the Assistant Attorney General in charge of the Criminal Division is answered by Judge Werker's opinion in Crispino, supra. Section 510 of Title 28 permits the Attorney General to delegate any of his functions to "any other officer" of the Department of Justice. By regulation, 28 C.F.R. 0.60 and 0.55, the Attorney General delegated his power to designate attorneys to present evidence to grand juries in all cases "assigned to, conducted, handled, or supervised by the Assistant Attorney General in charge of the Criminal Division" to the Assistant Attorney General. This includes prosecution of all federal crimes not otherwise specifically assigned. It included the coordination of enforcement activities against organized crime and racketeering. See May v. United States, supra, 236 Fed at 499; see also United States v. Twining, supra, 132 Fed. at 130.

As Judge Werker concluded in Crispino (slip opinion pp. 4-5; A. 63-64):

> It thus appears that the power to appoint Special Attorneys was properly delegated to Mr. Petersen. This is not a case of improper delegation as was found in United States v. Giordano, 416 U.S. 505 (1974). That case involved a question of delegation of power to authorize wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520. Section 2516(1) of that act allows the Attorney

> General or any Assistant Attorney General to authorize the application. The official who authorized the wiretap in Giordano was in fact the Executive Assistant to the Attorney General. The Court concluded that despite the broad delegation provision in 28 U.S.C. §510, Congress in enacting §2516(1) 'intended to limit the power to authorize wiretap applications by the Attorney General himself and to any Assistant Attorney General he might designate.' 416 U.S. at 514. In enacting section 515(a)... there was no limitation imposed on the Attorney General's ability to delegate his power of appointment of Special Attorneys to other officers of the Department of Justice such as Mr. Petersen. (Footnote omitted).

Nor is it necessary that the letters of appointment contain a statement that the assignment of a particular attorney is at the direction of the Deputy Attorney General. The regulations give the Assistant Attorney General power to act, without first receiving approval from the Deputy Attorney General.

In short, there is no substance to the claim of improper delegation.

III. A Grand Jury Witness May Not Complain About The Scope of Authority of a Government Attorney Assigned to Conduct a Grand Jury Inquiry.

Finally, a grand jury witness may not complain about the scope of authority of a government attorney to conduct a grand jury inquiry, especially where, as here, the attorney

has been "specifically directed" to conduct that inquiry by an Assistant Attorney General under power delegated to him by the Attorney General.

Appellant simply has no standing to complain about the scope of the authority of the government attorney. This follows from Blair v. United States, 250 U.S. 273 (1919) where a grand jury witness contended that he was excused from answering questions because of the alleged invalidity of the statutes which were the subject of the inquiry. In rejecting this argument, the Supreme Court ruled that a witness could not set limits to the investigation or take exception to the jurisdiction of the grand jury or the court over the particular subject matter. As the court said:

> On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a de facto existence and organization. 250 U.S. at 283.

Like principles preclude any challenge to the government attorney here. See also United States v. Calandra, supra, 414 U.S. 330. Any holding to the contrary would "saddle a grand jury with minitrials." United States v. Dionisio, 410 U.S. 1, 17 (1973). See also United States ex rel Rosado v. Flood, 394 F.2d 139, 141 (2nd Cir.), cert. den., 393 U.S. 855 (1968).

But beyond any question of standing, no defendant, let alone a witness, has the right to nullify grand

jury proceedings on the ground here urged. United States v. Kazonis, No. 74-238-5 (D. Mass), decided March 24, 1975.[20] Just as an indictment may not be quashed on the ground that there was inadequate or incompetent evidence before a grand jury, a grand jury inquiry or an indictment is not subject to challenge because of the scope of authority of a government attorney "specifically directed" by his superiors to appear before a grand jury. Such a challenge "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." Costello v. United States, 350 U.S. 359, 364 (1956).

The claim here, moreover, falls into the category of a "housekeeping provision of the Department of Justice." If the letter of authority should have been limited to "organized crime" cases, in order to avoid the possibility of interference with a local United States Attorney who in turn is under the

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20/ As Judge Skinner points out:

> The tradition of the common law thus accommodated the presence in the grand jury of any lawyer chosen by the individual prosecutor for the purpose of presenting the evidence, without regard to his particular commission or authority. The presence of the Special Attorney is clearly no violation of a fundamental rule but is in accord with an ancient tradition.

supervision of the Attorney General, this is a matter over which neither a witness nor a defendant should have a right to complain. See United States v. Sullivan, supra, at 173 where the Supreme Court, in discussing an Executive Order which the United States Attorney had failed to comply with, stated:

> It was simply a housekeeping provision of the Department and was not intended to curtail or limit the well-recognized power of the grand jury to consider and investigate any alleged crime within its jurisdiction...
>
> ...The evidence was presented by the District Attorney, who was a representative of the Department of Justice, notwithstanding that he failed to comply with the departmental directive. For this he is answerable to the Department, but his action before the grand jury was not subject to attack by one indicated by the grand jury on such evidence.

Here too there may be no valid attack on the grand jury proceedings.[21]/

21/ In no event was the government attorney "unauthorized" to appear before the grand jury within the meaning of the cases holding that "unauthorized persons" may not appear before the grand jury. So long as he had a status recognized by Rule 6(d) and was "specifically directed" to appear by the Assistant Attorney General, he could properly appear and question appellant before the grand jury. See May v. United States, supra, 236 F.2d at 500; United States v. Kazonis, supra.

IV. The Order Conferring Immunity and Directing Appellant to Testify Before The Grand Jury Was Valid.

Appellant contended in the court below that the use immunity previously granted to him was no longer valid, arguing that the previous proceedings in June 1974 had terminated (A. 17, lines 15-19, A. 19, lines 6-7) and the old authorization and order had expired (A. 18, lines 21-22).[22/] He asserted that the Attorney General was required to again approve the application for his grant of immunity (A. 18, lines 9-10, 12-14, 21-22) and that the district court was required to issue a new written order compelling appellant to appear before the special grand jury (A. 17, lines 15-19). We submit that this contention was properly rejected.

The May 28, 1974 authorization regarding appellant's immunity from the Assistant Attorney General of the Criminal Division to the United States Attorney and Mr. Del Grosso (A. 56), stated in pertinent part:

> Your request for authority to apply to the United States District Court for the Eastern District of New York for an order or orders requiring Thomas Di Bella to give testimony or provide other information pursuant to 18 U.S.C. 6002-6003 in

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22/ The May 1974 Special Grand Jury, however, had not terminated its proceedings and petitioner was re-subpoenaed to appear before this same investigating body (A. 19, line 21-A. 20, line 3).

> the above matter and in any further proceedings resulting therefrom or ancillary thereto is hereby approved pursuant to the authority vested in me by 18 U.S.C. 6002-6003 and 28 C.F.R. 0.175. (Emphasis added.)

Since the Assistant Attorney General gave his approval on that occasion for "an order or orders...in the above matter and in any further proceedings," on this basis alone the court below was correct in concluding (A. 20, lines 13-15, A. 29, lines 7-11) that no new authorization was required.

A new order from the district court was also not required. The June 10, 1974 order of the district court directing appellant to testify (A. 52) stated in pertinent part:

> it is hereby ORDERED that THOMAS DI BELLA answer all questions directed to him by the aforesaid Grand Jury in the Eastern District of New York.
>
> * * * *
>
> It is further ORDERED that no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against THOMAS DI BELLA in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

No language in this order limits its effectiveness to any one appearance by appellant before the special grand jury on any one particular date, as appellant contends. Moreover, at the court hearing on March 3, 1975, Judge Platt stated that a new written immunity order, which he repeatedly expressed his

willingness to sign (A. 17 lines 22-23, A. 18 line 7, A. 20 line 1, A. 31 line 5) out of an excess of caution (A. 31 line 6), was superfluous (A. 31 line 6). This constituted an oral reaffirmance of the June 10, 1974 order's continuing validity by an authorized judge of the issuing court. This, we submit, should settle any question that the order still conferred immunity upon appellant pursuant to 18 U.S.C. 6002 and 6003. See, Maness v. Meyers, ___ U.S. ___ (1975), 43 L.W. 4143, 4151 (White, J., Concurring).

Appellant now contends for the first time on appeal (Br. 20) that there was no new showing in March 3, 1975 that his testimony was still "necessary to the public interest." The short answer to this contention is that the public interest is best served by a complete investigation and the examination of every witness and every clue. See, e.g., United States v. Calandra, supra, 414 U.S. at 344.[23/]

V. THERE IS NO REASON TO REQUIRE ANY FURTHER PROCEEDINGS IN THE DISTRICT COURT

If, as we have argued, appellant has received a valid grant of use immunity and he may be properly questioned by the strike force attorney, he has no justification for his continued refusal to answer the questions put to him before the grand jury. Nor, as we show below, do the various claims of irregularities in the procedure leading to appellant's confinement for civil contempt warrant further proceedings in the district court.

23/ At the March 3, 1975 hearing, Mr. Del Grosso continued to rely on the validity of the June 10, 1974 order and application, which application included his prior affidavit that appellant's testimony was "necessary to the public interest." (A. 54).

1. Appellant contends that both he "and his attorney were given absolutely no opportunity to hear the grand jury testimony which was read to Judge Platt or to contest the propriety of the specific questions which were asked of DiBella" and he thereby was denied the effective assistance of counsel (Br. 19). However, the substance of these questions was never at issue below since appellant refused to answer any questions.

In any event, the factual assertions upon which his argument is based ignores the complete proceeding below. Appellant first heard the grand jury questions when they were propounded to him on March 3, 1975 in the grand jury and there is no suggestion in the record that appellant was not given an opportunity to consult with his attorney during the grand jury questioning. Again, at the court hearing on March 3, 1975, the subject of the questions was discussed in the presence of appellant and his attorney (A. 16 lines 15-22, A. 32 lines 3-6, A. 35 line 25, A. 36 line 1). Finally, just prior to the reading of the grand jury minutes, the trial court stated that during their reading appellant's counsel could confer with appellant outside the courtroom "and he may explain it [sic] to you what his recollection of the questions were ..." (A. 33 lines 5-6), or appellant could remain in the courtroom during the reading (A. 33 lines 9-10). Counsel chose the latter course and stated that he would confer with his client "after the questions are read into the record" (A. 33, lines 11-12). Appellant did in

fact remain in the courtroom while the grand jury minutes were read to Judge Platt.[29] He was then given the opportunity to consult with counsel (A. 35, lines 1-2). Thereafter, appellant's counsel stated (A. 36, lines 2-8):

> If the Court pleases, I respectfully raise all the objections I made at my first appearance here as to the strike force and I raise the same objections I made in reference to the order and all the other objections and if the Court will overrule all those objections again, I got it on the record.

The court responded: "Yes, I overrule the objections" (A. 36, line 9).

The record thus shows that appellant heard the March 3, 1975 grand jury questions on two occasions and that he had opportunities to consult with counsel about the questioning on both occasions. It also shows that appellant's counsel never complained to the district court that appellant could not recollect the question. In addition, we agree with the district court, who stated: "This witness is not going to answer any questions before the grand jury . . . So, [the phrasing of the particular questions asked] doesn't make any difference . . . " (A. 44, lines 1-3).

In these circumstances, we submit that appellant was not denied the effective assistance of counsel.

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[29] On April 2, 1975, appellant's counsel, Mr. Boitel, who was not present at the hearing before Judge Platt, conceded by telephone that he had erred in asserting that appellant was excluded from the March 3, 1975 court proceeding during the reading of the grand jury minutes.

2. The general public was excluded by the court from the courtroom when the grand jury questions were read. This exclusion remained in effect during the subsequent civil contempt proceeding. As we interpret the record, appellant never objected or requested that the contempt hearing be open to the public after the reading of the grand jury minutes. Before the grand jury minutes were read, appellant did state that he did not want the courtroom cleared and that he wanted a friend of appellant to remain in the courtroom. When this was denied, appellant's counsel stated "All right" (A. 15, lines 13-17). At no point, however, after the grand jury questions were read, did appellant tell the court that there was no longer any need for secrecy and that he had a right to an open proceeding. His complaint here is that the general public should have been present during the civil contempt proceeding. Appellant did not say there was no need for secrecy and that he had a right to an open proceeding.

In Levine v. United States, 362 U.S. 610, 616 (1960), the Supreme Court held that even criminal contempt proceedings are not within those criminal prosecutions to which the Sixth Amendment right to a public trial applies.[24/] In Levine, supra, the Supreme Court stated:

24/ This court recently held that summary civil contempt proceedings under 28 U.S.C. 1826 involve less stringent procedural rights than criminal contempt proceedings. In re Persico, 491 491 F.2d 1156, 1162 (2nd Cir., 1974), cert. den., U.S. , 95 S.Ct. 199 (October 21, 1975). But cf. In re Sealed, F.2d (CON'T)

Inasmuch as the petitoner's claim thus derives from the Due Process Clause and not from one of the explicitly defined procedural safeguards of the Constitution, decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and absolute right to a 'public trial.' Id. at 616-617.

* * * *

Since...a summary adjudication of contempt occurs in the midst of a grand jury proceeding, a clash may arise between the interest, sanctioned by history and statute, in preserving the secrecy of grand jury proceedings, and the interest, deriving from the Due Process Clause, in preserving the public nature of court proceedings.* * * * Petitioner had no right to have the general public present while the grand jury's questions were being read. However, after the record of the morning's grand jury proceedings had been read...there was no further cause for enforcing secrecy in the sense of excluding the general public.

The continuing exclusion of the public in this case is not to be deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom at the final stage of the proceeding, thereby giving notice of the claim now made and affording the judge an opportunity to avoid reliance on it. This was not a case of the kind of secrecy that deprived

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(Footnote continued) (2nd Cir., No. 74-2003, decided January 23, 1975) which ignores In re Persico, supra, and relies on criminal contempt cases including United States v. Wilson, 488 F.2d 1231 (2nd Cir. 1973), cert. granted, 416 U.S. 981.

> petitioner of effective legal assistance and rendered irrelevant his failure to insist upon the claim he now makes. **** The proceedings properly began out of the public's presence and one stage of them flowed naturally into the next. There was no obvious point at which, in light of the presence of counsel, it can be said that the onus was imperatively upon the trial judge to interrupt the course of proceedings upon his own motion and establish a conventional public trial. We cannot view petitioner's untenable general objection to the nature of the proceedings...as constituting appropriate notice of an objection to the exclusion of the general public...
>
> This case is wholly unlike In re Oliver, 333 U.S. 257. This is not a case where it is or could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny; nor is it urged that publicity would in the slightest have affected the conduct of the proceedings or their result. Id. at 618-619.

The language in Levine applies equally well here where the district court initially stated that it closed the hearing to protect the secrecy of the ongoing grand jury proceedings (A. 15, lines 15-16) and no subsequent demand for a public proceeding was made.

In these circumstances, where appellant does not dispute that he has no intention of answering any questions in the grand jury, there is no need to remand this case to the district court.

CONCLUSION

It is therefore respectfully submitted that the order of the district court should be affirmed.

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April 4, 1975

JCK:VDS:mg

Honorable A. Daniel Fusaro
Clerk, United States Court of
Appeals for the Second Circuit
New York, New York 10007

Re: In the Matter of THOMAS DI BELLA
Witness, No. 75-1121

Dear Mr. Fusaro:

Enclosed is the form you requested that we return as soon as possible and twenty-five corrected copies of the brief for the United States to replace the incorrected page-proofs previously filed. We have also sent two corrected copies this day to counsel for appellant.

Pursuant to permission obtained by telephone on April 4, 1975 from Miss Wooten of your office, I have corrected the page-proofs previously filed by adding in the corrected briefs the citation of Maness v. Meyers, ___U.S. _____ (1975), 43 L.W. 4143, 4151 (White, J., concurring) to the end of the seventh line of page 48 of our draft and by correcting the last two sentences at the end of the first full paragraph on page 50, which now reads:

> It also shows that appellant's counsel never complained to the district court that appellant could not recollect the questions. In addition, we agree with the district court who stated: "This witness is not going to answer any questions before the Grand Jury . . . So, [the phrasing of the particular questions asked] doesn't make any difference. . ." (A. 44, lines 1-3).

Very truly yours,

Victor D. Stone

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Enclosures

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